United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1600

To be argued by
JACOB LAUFER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1600

In re EDWARD DI SERO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1600

In re EDWARD DI SERO,

Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Edward Di Sero appeals from an order entered on December 27, 1976, in the United States District Court for the Southern District of New York by the Honorable Thomas P. Griesa, United States District Judge, adjudging Di Sero in civil contempt as a recalcitrant witness pursuant to Title 28, United States Code, Section 1826.

Statement of Facts

On December 13, 1976, Edward Di Sero appeared, pursuant to subpoena, before a Federal Grand Jury sitting in the Southern District of New York. At that time he was advised by Special Attorney Michael D. Abzug of the United States Attorney's Office for that district that he had been summoned to give testimony in connection with an investigation into alleged gambling violations. Upon being advised of his rights, including the right to aid of counsel, and being shown a Court

Order conferring upon him testimonial immunity pursuant to Title 18, United States Code, Section 6002, Di Sero stated that he did not wish to proceed in the absence of counsel. His appearance was adjourned.

On December 27, 1976, Di Sero once again appeared before the Grand Jury. He was accompanied on this occasion by his then and present attorney, Arnold E. Wallach, Esq. Di Sero was again advised of his right to remain silent and right to counsel, as well as the scope of the Grand Jury inquiry. After he indicated that he understood those rights, he was asked a number of questions relevant to the investigation, which he refused to answer on the basis of his privilege against self-incrimination. Di Sero was again shown the immunity order signed by Judge Griesa on December 13, 1976. Notwithstanding the order, Di Sero persisted in his refusal to testify. At that time, he presented a written "statement" (A. 27)* in which he claimed that he was "apprehensive" that his compelled testimony might be utilized by state law enforcement authorities to prosecute him (A. 27-29). Di Sero gave as an additional reason for his refusal to testify the assertion, premised solely "on information and belief," that the Grand Jury's questions "may" be based on illegal electronic surveillance (A. 29-30). Accordingly, he demanded that the United States Attorney request an "all-agency" search to ascertain whether he was the subject of illegal electronic surveillance.

In response, Mr. Abzug, the attorney in charge of the investigation, advised him, on the basis of his own knowledge and a conversation he had had with the Special

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* "A." refers to the appellant's appendix; "Br." refers to the appellant's brief.

Agent of the FBI familiar with the case, that "no conversations of you (sic) have been electronically intercepted and utilized in (the) investigation, nor were any electronic surveillances made over any premises in which (you) had a proprietary interest (and that) (t)herefore, any questions that (were) asked before (the) Grand Jury will not be based on any electronic surveillance whatsoever." (See A. 11-12).

Di Sero was then excused to be brought before Judge Griesa, at which time the Government moved to have him cited for civil contempt. Mr. Wallach reiterated Di Sero's two justifications for his refusal to testify, both of which were rejected by the Court. Judge Griesa noted that Di Sero's fear of a subsequent local prosecution was premature (A. 18), and found legally sufficient Mr. Abzug's representation, based in part on a conversation he had had with the FBI Special Agent familiar with the case, that they were "presently unaware of the results of any electronic or mechanical surveillance which, one, was directed against Mr. Edward Di Sero; two, resulted in the interception of any conversation in which Edward Di Sero participated; or three, was conducted in premises which the witness owned, leased, licensed or . . . had a proprietary interest" (A. 11-12, 13). In response to questioning by the Court, Mr. Abzug went on to deny awareness of the existence of any electronic surveillance. (A. 12).

Accordingly, after determining that Di Sero still refused to testify, the Court found him in civil contempt under Title 18, United States Code, Section 1826, and directed that he be remanded to the custody of the United States Marshal until such time as he would testify, or until the expiration of the Grand Jury's term, including any extensions, the confinement not to exceed 18 months. (A. 15-16). The Court refused to grant bail pending this appeal.

On January 18, 1977, a panel of this Court denied Di Sero's motion for bail pending argument on the merits.

ARGUMENT

POINT I

The Immunity Conferred Upon Di Sero Was Co-extensive With His Privilege Against Self-incrimination, and His Refusal to Testify Was Without "Just Cause."

As his first point on appeal, Di Sero raises a dual argument directed at showing that the immunity conferred upon him by the District Court was not co-extensive with his Fifth Amendment privilege against self-incrimination. He argues first that should he later be indicted in another jurisdiction, and, further, should he then elect to testify in his own behalf, then his trial testimony could be impeached by his compelled grand jury testimony. His second thrust against the immunity conferred upon him is that since the Government did not "certify" to the Court what evidence it possessed against him, the Government could later, with impunity, indict Di Sero on the basis of leads obtained from his compelled testimony, claiming that the evidence was independently derived. Both of these arguments are premature with respect to this appeal, and are patently devoid of merit.

It is well settled that a grant of use immunity pursuant to Title 18, United States Code, Section 6002 is "co-extensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972); *United States* v. *Huss*,

482 F.2d 38, 51 (2d Cir. 1973). *See also, United States* v. *Hinton*, 543 F.2d 1002, 1008 (2d Cir. 1976); *United States* v. *Kurzer*, 534 F.2d 511, 515-16 (2d Cir. 1976).

Nevertheless, Di Sero claims that the immunity afforded him by the District Court did not offer him adequate protection because of the possible occurrence of the following speculative scenario: He speculates that at some later undefined point in time "another jurisdiction say a state court, but particularly a New York State Court" might indict him.* (Br. 4). Further, he might elect to testify at the trial of this hypothetical indictment. Further, the prosecuting authorities might come into possession of either the minutes or substance of his compelled testimony.** Upon the coalescence of all of these hypothetical factors, he argues, his trial testimony could be impeached by his compelled grand jury testimony.

This argument is specious for a number of reasons. First, it is patently speculative and premature for Di Sero to claim potential ramifications of an indictment by another jurisdiction, which indictment does not and indeed may never, exist. Compare, *In the Matter of the Grand Jury Subpoena Served on John Doe*, Dkt. No. 76-1406, slip op. 865, 869 (2d Cir. Dec. 9, 1976). Second, if Di Sero were to give false testimony before the Grand Jury, it is clear under the law of this Circuit that that

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* It is unclear why Di Sero has focused upon a possible indictment in another jurisdiction, since local jurisdictions are required to accord equal force to immunized testimony, as must the jurisdiction in which a witness is immunized. *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52 (1964); *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974).

** Di Sero entirely ignores the fact that his grand jury testimony would be available to state prosecutors only under the circumscribed conditions prescribed by Rule 6(e) of the Federal Rules of Criminal Procedure.

testimony would indeed be proper material for impeachment, since the protection of immunity is accorded only to truthful testimony. *United States* v. *Tramunti*, 500 F.2d 1334, 1345-46 (2d Cir.), *cert. denied*, 419 U.S. 1079 (1974). Finally, and most emphatically, even if there were a question about the permissible use of Di Sero's testimony in the circumstances he describes, he will have an ample opportunity to raise those issues at the time of the proposed use of the testimony. His present claim—that the wholly speculative *possibility* of such use bars the Grand Jury from compelling his testimony, irrespective of the completeness of the immunity conferred upon him—is thus utterly premature. *In the Matter of the Grand Jury Subpoena Served on John Doe*, *supra*, slip op. at 869-70.

In his second thrust against the adequacy of the immunity conferred upon him by the District Court, Di Sero complains that the prosecutor did not "certify" to the District Court all of the evidence in his possession against Di Sero. Nor, Di Sero complains further, did the prosecutor notify "all other jurisdictions" of the immunity in order to give them an opportunity to similarly certify their evidence.

It is significant that Di Sero offers no citation of judicial authority for the novel proposition that the absence of such a certification procedure is "just cause" for his contumacious refusal to obey the District Court's order to testify. Indeed, as the authorities upon which Di Sero relies themselves indicate, the device of "certifying" available evidence is simply a means of allowing the prosecutor in any subsequent prosecution easily to meet his burden of showing lack of taint. Neither logic nor precedent imply, however, that it is the only means of doing so. See, e.g., *United States* v. *Bianco*, 534 F.2d 501 (2d Cir.), *cert. denied*, — U.S. —, 45 U.S.L.W. 3249 (Oct. 4, 1976). It follows that the claim is wholly

premature. If an attempt were made at a later time to make improper use of his compelled testimony or the fruits thereof, Di Sero would be able to put the prosecuting authority to its "heavy burden" not only of showing the absence of taint, but of demonstrating the "wholly independent, legitimate source of its evidence." *Kastigar* v. *United States*, *supra*, 406 U.S. at 460; *United States* v. *Hinton*, *supra*, 543 F.2d at 1008; *United States* v. *Kurzer*, *supra*, 534 F.2d at 516; *United States* v. *Bianco*, *supra*, 534 F.2d at 509; *Goldberg* v. *United States*, 472 F.2d 513, 515-16 (2d Cir. 1973).

POINT II

Di Sero Did Not Allege Sufficient Facts to State a "Claim" Under 18 U.S.C. Section 3504; In Any Event, the Government Sufficiently Responded To His Allegation of Unlawful Electronic Surveillance.

Di Sero claims that his refusal to obey the District Court's order to testify before the Grand Jury was justified by the Government's assertedly inadequate response to his request, apparently pursuant to Title 18, United States Code, Section 3504(a)(1),* that the Government either affirm or deny the existence of unlawful electronic surveillance. This claim is conclusively resolved by this Court's decision in *In re Millow*, 529 F.2d 770 (2d Cir. 1976), which is indistinguishable from from the facts of this case.

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* Section 3504 provides in relevant part:

(a) in any trial, hearing, or other proceeding in or before any . . . grand jury . . .

(1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act or because it was obtained by the exploitation of an unlawful act, the opponent of the claim shall affirm or deny the occurrence of the alleged unlawful act. . .

First, the only basis stated by Di Sero for this request was the conclusory allegation that "*upon information and belief* I *may* have been subjected to electronic surveillance and/or wire tapping in violation of my rights under the 4th and 5th Amendments to the Federal Constitution, and 18 U.S.C. Sections 2515, 2518(10) and 2510(11) of Title 18 thereof." (Emphasis added). Di Sero stated "no factual circumstances from which it could be inferred that he was the subject of an illegal wiretap. . . ." The Court ruled that his "[u]nsupported suspicion and patently frivolous assertions of government misconduct do not constitute a 'claim' under Section 3504 sufficient to trigger the government's obligation to disrupt grand jury proceedings and check thoroughly the applicable agency records." *In re Millow*, *supra*, 529 F.2d at 774-75.* See also *United States* v. *Stevens*, 510 F.2d 1101 (5th Cir. 1975); *Matter of Berry*, 521 F.2d 179, 184-85 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975). Second, even assuming *arguendo* that Di Sero's bald allegation constituted a claim under Section 3504, the prosecutor's response before the District Court denying on his own behalf, and on behalf of the FBI Special Agent familiar with the investigation, awareness of the results or existence of electronic surveillance, was surely a sufficient response to such an allegation. *In re*

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* Indeed, this case follows *a fortiori* from *Millow*. In *Millow*, the witness demonstrated his "attorney's knowledge that some electronic surveillance had been used in the investigation of other persons involved in the same activities that led to the examination of Millow . . . ." 529 F.2d at 72. Even though this Court found this allegation to be insufficient to trigger the need for a response, Di Sero has not even demonstrated or even suggested *any* factual basis for concluding that *any* electronic surveillance was conducted concerning Di Sero. In the face of a totally conclusory allegation based solely "upon information and belief," the Government's categorical response that its investigation had not been based upon electronic surveillance was more than sufficient.

Millow, *supra*, 519 F.2d at 775; see also *United States* v. *Van Orsdell*, 521 F.2d 1323, 1325 (2d Cir. 1975), *cert. denied*, 423 U.S. 1059 (1976); *United States* v. *Grusse*, 515 F.2d 157 (2d Cir. 1975); *United States* v. *See*, 505 F.2d 845, 855 (9th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *United States* v. *Alter*, 482 F.2d 1016, 1026 (9th Cir. 1973); *In re Horn*, 458 F.2d 468, 471-72 (3rd Cir. 1972). In addition, and in order to put this matter to rest, at the time of oral argument the Government will proffer to the Court additional affidavits from those in charge of the prosecution detailing the absence of any electronic surveillance with respect to this case. Cf. *In re Millow*, *supra*, 529 F.2d at 772 n.4; *In re Buscaglia*, 518 F.2d 77 (2d Cir. 1975).

CONCLUSION

The District Court's order of contempt should be affirmed.

Respectfully submitted,

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June H. Dobson

deposes and says that she is employed in the office of the Joint Strike Force for the Southern District of New York.

That on the 3rd day of February, 1977 she served 2 copies of the within Brief by placing the same in a properly postpaid franked enveloped addressed:

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And deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

June H. Dobson

Sworn to before me this

3rd day of February 1977

Steven K. Frankel
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Notary Public, State of New York
No. [illegible]
Qualified in Kings County
Commission Expires March 30, 19[illegible]